

Small Business Issues 2009

John Klein, Kenneth Dodds,
Laura Mann Eyester & Dean Koppel

U.S. Small Business Administration



8(a) Business Development

- ▶ Procuring Agency must Offer Requirement to SBA (13 CFR 124.502)
 - Offer required even if acquisition is repetitive
 - Offering letter must contain all information on current performance and prior acquisition history
 - SBA may not accept a requirement if acceptance would adversely impact a small business concern (13 CFR 124.504)
 - Does not apply if a requirement is new, but only SBA can make this determination
 - SBA may not accept requirement if agency previously expressed its intent to set acquisition aside for small business concerns (13 CFR 124.504)
 - Applies to current acquisition. The fact that prior acquisition was small business set-aside is not relevant.

8(a) Business Development

- ▶ Acquisitions valued above \$3.5 million (\$5.5 million for manufacturing) are competed among eligible Participants (FAR 19.805-1)
 - Firms owned and controlled by Indian Tribes (including Alaska Native Corporations) may receive sole source contracts above those amounts (13 CFR 124.506); Applies to JVs involving those firms as well; for DOD contracts, firms owned by Native Hawaiian Organizations may also receive 8(a) contracts above the competitive threshold amounts
 - Must request permission from SBA to compete acquisitions valued below those amounts (13 CFR 124.506)
 - Construction competitions should be limited to firms with bona fide places of business within a specific geographical boundary (13 CFR 124.507)
- ▶ Prior to award, procuring agency must request an eligibility determination from SBA concerning the apparent successful offeror (13 CFR 124.507)


Mentor/Protégé Joint Ventures

- ▶ An 8(a) Participant may enter into a Mentor-Protégé relationship with any concern, including a large business, and submit an offer as a joint venture and be considered a small business on any government procurement, as long as the protégé is small (13 CFR 121.103)
 - But not HUBZone or SDVO, unless meet specific JV requirements
- ▶ SBA must approve the mentor-protégé relationship prior to **offer**, because general rule is that two concerns that submit an offer as a joint venture are affiliated
- ▶ For 8(a) procurements, SBA must approve the joint venture agreement prior to contract **award** (13 CFR 124.513)
- ▶ Performance requirements (i.e., limitations on subcontracting, “50% rule”) must be met by the JV; 8(a) Participant must perform a “significant portion” of the contract

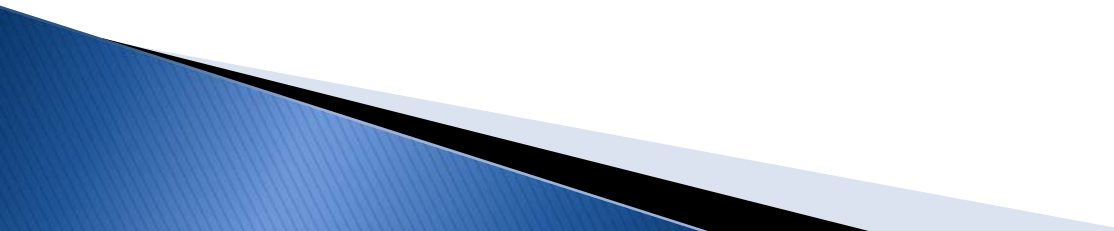
Joint Ventures

- ▶ SBA's regulations allow the same joint venture to submit offers on up to three procurements in two year period (13 CFR 121.103)
 - The same two entities may create additional joint venture entities to seek additional contract opportunities
 - This rule was not intended as a limitation on mentor/protégé joint venture contracting. It was intended to save the mentor/protégé the time and expense of creating a new entity for each and every contract opportunity

Proposed 8(a) Rules

- ▶ 74 Fed. Reg. 55694 (October 28, 2009)
 - ▶ Comments due by December 28, 2009
 - ▶ Change JV entity limitation to 3 contract awards.
Clarifies that rule violation will lead to affiliation.
Clarifies that repeated joint venturing could lead to affiliation.
 - ▶ Mandates graduation if a firm is large for its primary industry
 - ▶ Provides for offer and acceptance of orders under multiple award procurements
- 

Proposed 8(a) Rules

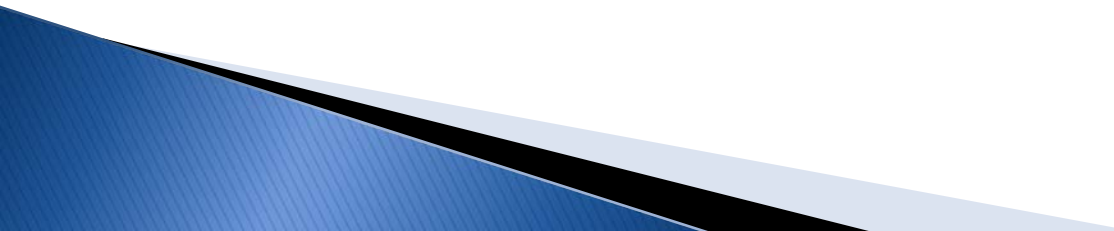
- ▶ Once 8(a), Always 8(a)
 - ▶ Non-8(a) Joint Venturer cannot be a subcontractor on a sole source contract
 - ▶ 8(a) Participant must perform 40% of the work performed by the Joint Venture
- 

HUBZone Program

▶ Purpose

- Provide Federal contracting assistance to qualified small businesses located in historically underutilized business zones (HUBZones) to increase employment opportunities, investment and economic development in those areas.

▶ Main Eligibility Criteria

- Principal Office
 - HUBZone residency
 - Ownership and control
 - Size
- 

HUBZone Program cont'd

- The small business can have more than one office, but the principal office must be located in a HUBZone.
- A HUBZone includes qualified census tracts, qualified non-metropolitan counties, lands within the external boundaries of an Indian reservation, redesignated areas, or base closure areas.
- A principal office is the location where the greatest number of the concern's employees at any one location perform their work. However, for those concerns whose 'primary industry' is service or construction, the determination of principal office excludes the concern's employees who perform the majority of their work at job-site locations to fulfill specific contract obligations.

HUBZone Program cont'd

- ▶ At least 35% of ALL of the HUBZone SBC's employees must reside in a HUBZone. This includes those employees that work at job sites and those that do not work at the principal office.
- ▶ An employee means a person (or persons) employed by a HUBZone SBC on a full-time [FT] (or full-time equivalent [FTE]), permanent basis. Full-time equivalent includes employees who work 30 hours per week or more. Full-time equivalent also includes the aggregate of employees who work less than 30 hours a week, where the work hours of such employees add up to at least a 40 hour work week. The totality of the circumstances, including factors relevant for tax purposes, will determine whether persons are employees of a concern. Temporary employees, independent contractors or leased employees are not employees for these purposes.

HUBZone Program cont'd

- ▶ Example of Employee Definition: 1 employee works 20 hours per week and 1 employee works 15 hours per week; SBA will regard that circumstance as not a full-time equivalent.
- ▶ New Definition of Term Employee: On November 3, 2009, SBA issued a final rule, effective May 3, 2010, that revises the definition of the term “employee” to read as follows:
 - Employee means all individuals employed on a full-time, part-time, or other basis, so long as that individual works a minimum of 40 hours per month. This includes employees obtained from a temporary employee agency, leasing concern, or through a union agreement or co-employed pursuant to a professional employer organization agreement. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes and those set forth in SBA’s Size Policy Statement No. 1, in determining whether individuals are employees of a concern. Volunteers (i.e., individuals who receive deferred compensation or no compensation, including no in-kind compensation, for work performed) are not considered employees. However, if an individual has an ownership interest in and works for the HUBZone SBC a minimum of 40 hours per month, that owner is considered an employee regardless of whether or not the individual receives compensation.

HUBZone Program cont'd

▶ OTHER PROGRAM REQUIREMENTS:

- Joint Ventures: Only joint venture of two or more HUBZone small businesses permitted for HUBZone contract.
- Subcontracting Limitations:
 - Services: Must spend at least 50% of cost of contract performance for HUBZone small business' employees or employees of other qualified HUBZone small businesses.
 - Supplies: Must spend at least 50% of manufacturing cost on performing contract in a HUBZone.
 - Nonmanufacturer rule: Must meet the requirements of the nonmanufacturer rule and the small manufacturer providing the end product must be a qualified HUBZone small business. There are no waivers except that under \$25k, may supply end item of any manufacturer so long as product is manufactured or produced in the United States.
 - Construction: Must spend at least 50% of cost of contract incurred for personnel on its own employees or may subcontract at least 35% (general construction) or 25% (specialty construction) to one or more HUBZone small businesses.

HUBZone Program cont'd

▶ HUBZONE STATUS PROTESTS

- List: At the time of initial offer and contract award, the small business must be certified by the SBA and on the List (DSBS) as a HUBZone SBC.
- Filing: All protests filed with CO, except those by CO and SBA. CO then refers the protest immediately to Director/HUB (even if CO believes it is not sufficient or not timely) unless the protest is premature. SBA will then ask for information about the acquisition to determine whether the protest is timely, interested party etc.
- Timeline: SBA notifies all parties whether it has accepted protest and if it has, SBA requests documents and information from protested concern. SBA generally determines protests within 15 business days after receipt of protest, but may request an extension, depending on complexity of protest. SBA then notifies all parties of decision. CO may award K after receipt of protest, if determine in writing that award must be made to protect public interest.
- Appeal: The protester, protested concern, or the contracting officer may appeal this decision to the Associate Administrator for Government Contracting and Business Development within five business days from receipt of the protest letter. AA/GCBD will make decision within 5 business days after receipt of appeal, if practicable.

Size Protests

- ▶ Pre-award notice required for negotiated small business program acquisitions. FAR 15.503(a)(1).
- ▶ Time frame for making size determination. After receipt of a protest or a request for a formal size determination, SBA will make a formal size determination within 10 working days, if possible. 13 CFR 121.1009(a).
- ▶ A timely filed protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest. 13 CFR 121.1004(c).
- ▶ A formal size determination becomes effective immediately and remains in full force and effect unless and until reversed by SBA's Office of Hearings and Appeals (OHA). 13 CFR 121.1009(g)(1).

Size Protests

- ▶ A formal size determination is issued by the SBA Area Office for the geographical area where the protested concern is located
- ▶ Formal size determinations may be appealed to OHA

Size Protests

- ▶ Regulations allow agency to move forward with acquisition based on initial decision, regardless of whether an appeal is filed
 - No requirement to withhold award even when on notice of a size appeal
 - Procuring agency must follow size appeal decision if received before award
 - Thus, if SBA finds successful offeror to be small, proceed with award or allow performance to commence
 - If SBA finds successful offeror to be other than small, and an appeal is filed, agency can withhold award or stay performance until OHA issues a decision, or award to another offeror. If no appeal is filed agency should award to another offeror.

Size Protests

- ▶ A firm can meet the performance requirements (limitations on subcontracting) and still be found to be other than small, based on its reliance on a subcontractor. **SecTek, Inc.**, SBA No. SIZ-4558 (2003); **Mathews Construction Company**, SBA No. SIZ-3592 (1992).
- ▶ A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract (or order) or a subcontractor upon which the prime contractor is unusually reliant. 13 CFR 121.103(h)(4).

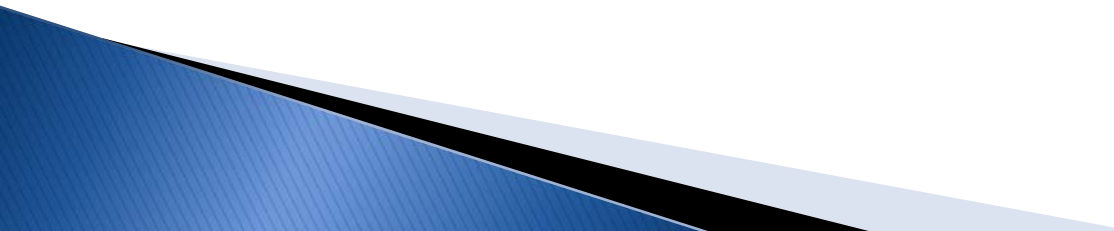
Re-Certification

- ▶ SBA Rule Published: November 15, 2006, 71 Fed. Reg. 66434
- ▶ Effective Date: June 30, 2007
- ▶ Implementing FAR clauses: 19.308(d), 52.219-28
- ▶ Long-Term Contracts (durations greater than five (5) years)
 - Re-certification required prior to the beginning of 6th year, and prior to the exercise of each option thereafter
 - Agencies can use higher corresponding size standards
 - No requirement to terminate contracts, or prohibition on exercising options where size status changes
 - Does not change terms and conditions of contract, i.e., limitations on subcontracting, subcontracting plan, 8(a) regulations that require termination if ownership/control changes, etc.
 - Applies to existing contracts and solicitations
 - NAICS code/size standard required for all orders & solicitations for orders
 - Contracting officers have discretion to request size certifications in connection with solicitations for orders

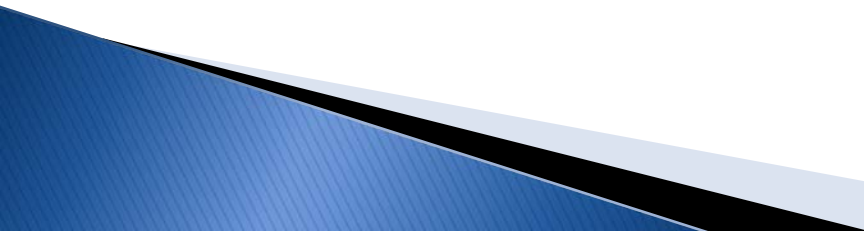
Re-Certification

- ▶ Re-certification required in case of novation, acquisition or merger
 - Applies to all contracts, not just long-term contracts
 - Applies regardless of when merger or acquisition occurred
- ▶ No requirement to re-certify for subcontracting purposes
- ▶ No requirement to re-certify for other programs
 - But change in size will change other socio-economic classifications for the contract in question, i.e., if a concern is not small for contract, concern is also not SDB, HUBZone, 8(a), SDVO, WOSB, etc. for that contract
- ▶ No requirement to re-certify for long-term orders

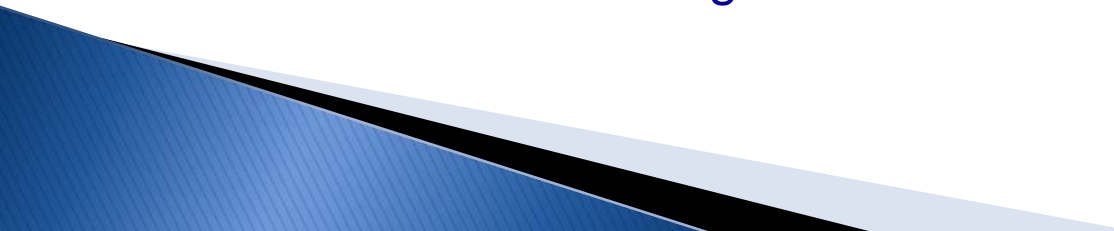
Service-Disabled Veteran-Owned

- ▶ Public Law 106-50 - The Veteran's Entrepreneurship and Development Act of 1999
 - ▶ Public Law 108-183 – The Veterans Benefits Act of 2003
 - ▶ SBA Final Rule – 70 FR 14523 (March 23, 2005)
- 

Service-Disabled Veteran-Owned

- ▶ SBA is the coordinating entity for veteran contracting advocacy for the Federal Government
 - ▶ DVA now has its own statutory Vet and SDVet small business set-aside program
 - ▶ DVA has not yet finalized its procurement regulations
 - ▶ Vet and SDVet SBCs must register in the DVA's database, VetBiz, to be eligible for award of a DVA contract.
- 

Service-Disabled Veteran-Owned

- Disability Adjudication by VA and DOD
 - SDVO SBC Status Adjudicated by SBA
 - SDVO SBC must be a small business
 - 51% Unconditionally and directly owned by SDV
 - Management and daily business operations controlled by SDV
 - SDV must hold Highest Position
- 

Service-Disabled Veteran-Owned

- Competitive Set-asides
 - Considerations – Rule of Two
 - Set-Aside Exemptions Ability-One, FPI

Sole Source – Only one SDVet Source identified that can meet needs

- Simplified Acquisitions - Discretionary
- 

Service-Disabled Veteran-Owned

- JOINT VENTURES (13 CFR 125.15(b))
- An SDVO SBC may joint venture with one or more other small business concerns
- The SDV must manage the venture and an SDVO SBC employee must be the project manager

Service-Disabled Veteran-Owned

- SUBCONTRACTING Limitations (13 CFR 125.6(b))
 - Services – 50% labor spent on SDVO SBC personnel
 - Supplies – 50% labor performed by SDVO SBC
 - General Construction – 15% labor spent on SDVO SBC personnel
 - Special Trade Construction – 25% of labor spent on SDVO SBC personnel
 - JV must also meet Limitation on Subcontracting requirements
- NON-MANUFACTURERS (13 CFR 121.406(b))

SDVO SBC cannot exceed 500 employees

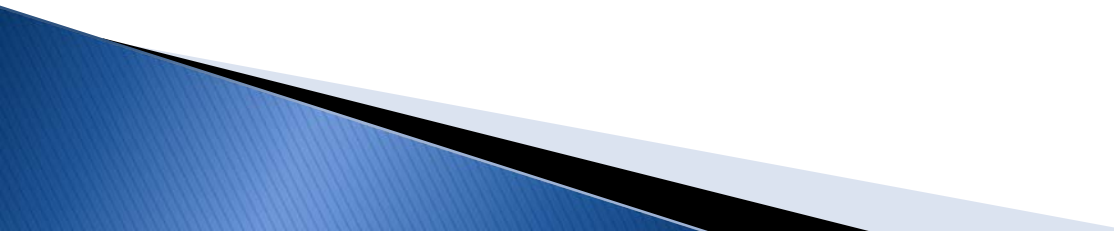
End item must be manufactured by a SB



Service-Disabled Veteran-Owned

- Protests
- WHAT CAN BE PROTESTED? SDVet Status, Small Business Size Status. Status protest to CO or SBA and are not filed with a Status protest. They are each handled separately
- WHO MAY PROTEST? Sole Source, SBA or CO; Competitive: Any Interested Party, SBA or CO
- WHEN ARE PROTESTS SUBMITTED? RFP: By COB on the 5th Business Day; Sealed Bid: By COB on 5th Business Day after bid opening Later than that: Untimely
- WHERE ARE PROTESTS SUBMITTED? To the CO.
- HOW ARE PROTEST SUBMITTED? In writing.

Service-Disabled Veteran-Owned

- Appeals
 - Interested parties may appeal the protest determination
 - Appeals are submitted to SBA's Office of Hearings and Appeals
 - Due 10 days after receipt of protest determination
 - Appeals are filed in accordance with 13 CFR 134.501
 - Decision within 15 business days of close of record
- 

INTERACTION OF SMALL BUSINESS PROGRAMS

▶ **BACKGROUND**

- There are SBA and FAR regulations, GAO decisions, and an Office of Legal Counsel (OLC) opinion all relating to this issue, which differ.



▶ **GAO DECISIONS**

- The GAO has issued two decisions that conflict with SBA's regulations and which provide that agencies must set aside any acquisition for HUBZone SBCs if the contracting officer has a reasonable expectation that at least two qualified HUBZone SBCs will submit offers and that the award can be made at a fair market price (often referred to as the "rule of two"). International Program Group, Inc., B-400278, B-400308, Sept. 19, 2008, 2008 CPD ¶ 172, recon. denied, Small Bus. Admin., B-400278.2, B-400278.3, B-400308.2, B-400308.3, Oct. 24, 2008; Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93, recon. denied, Small Bus. Admin., B-401057.2, July 6, 2009, 2009 CPD ¶ 148.
- Under these GAO rulings, the contracting officer has no discretion to utilize either the 8(a) BD or SDVO SBC programs if the HUBZone rule of two is met.
- When would you ever award through the 8(a) BD or SDVO SBC programs?

INTERACTION OF SMALL BUSINESS PROGRAMS cont'd

▶ **OMB DIRECTIVE**

- On July 10, 2009, the Director of the Office of Management and Budget (OMB) issued a memorandum stating that the two GAO decisions are not binding on Federal agencies and are contrary to regulations promulgated by SBA that provide for “parity” among the three small business programs (8(a) BD, HUBZone and SDVO SBC programs). See OMB Memorandum M-09-23, publicly available at http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-23.pdf.
- The memorandum stated that an Executive Branch review of the legal basis underlying GAO’s decisions had been initiated and that pending the results of the review, the applicable SBA “parity” regulations remained binding and in effect as validly-promulgated implementations of the governing statutes.

INTERACTION OF SMALL BUSINESS PROGRAMS

cont'd

▶ **OLC LEGAL MEMORANDUM**

- On August 21, 2009, the U.S. Department of Justice's OLC issued an opinion stating that SBA's regulations governing the interplay among the HUBZone, 8(a) BD and SDVO SBC programs are a permissible construction of the Small Business Act and are binding on all Executive Branch agencies. See <http://www.usdoj.gov/olc/2009/sba-hubzone-opinion082109.pdf>.
- OLC's opinion stated that, contrary to GAO's rulings, the Act does not compel the prioritization of awards under the HUBZone program over those under the 8(a)BD or SDVO SBC programs. "Rather, the text of the HUBZone provision may be fairly read as mandating only that a contract opportunity – already set aside for HUBZone small businesses in the discretion of a contracting officer – be awarded on the basis of restricted competition, and not as a sole source award, if the rule of two is met."

INTERACTION OF SMALL BUSINESS PROGRAMS

cont'd

• **BELOW THE SAT.**

- Small business set asides are mandatory for the acquisition of supplies and services valued from \$3,000 to \$100,000. However, may award using the 8(a), HUBZone and SDVO SBC programs. Lamar International, Inc., B-297231, Oct. 19, 2005 (FAR permits but does not require the reservation of an award of a contract with a value less than the SAT to different types of small businesses such as 8(a), HUBZone or SDVO SBCs).



• **ABOVE THE SAT.**

- Small business set asides are mandatory for acquisition of supplies and services valued above \$100,000.
- However, SBA's regulations provide that you shall consider the 8(a) BD, HUBZone and SDVO SBC programs before using a small business set aside. In addition, SBA's regulations provide for parity among the 8(a), HUBZone and SDVO SBC programs. DOJ's OLC stated that this regulation was permissible.
- In determining which program to use, the CO must conduct market research and should take into consideration historical data, anticipated award price, and other pertinent factors such as the procuring activity's progress towards meeting its goals.



INTERACTION OF SMALL BUSINESS PROGRAMS

cont'd

- **SWITCHING PROGRAMS**

- If an 8(a) BD Participant is currently performing the requirement through the 8(a) BD Program, the CO may not procure a follow-on requirement through the HUBZone or SDVO SBC programs unless SBA has consented to release the requirement from the 8(a) BD program. 13 C.F.R. 126.605(b) and 125.18(b).
- If a SBC is currently performing the specific requirement or had performed the requirement (i.e., the specific requirement had previously been set aside for SBCs and resulted in an award to a SBC), the CO may still award a contract to a qualified HUBZone SBC pursuant to the HUBZone program or an SDVO SBC pursuant to the SDVO SBC program, at the discretion of the CO.
 - No adverse impact analysis is required.
- If a SBC is currently performing the specific requirement or had performed the requirement, the CO may also award a contract to an 8(a) BD Participant pursuant to the 8(a) BD program, if there is no adverse impact and the SBA accepts the acquisition into the 8(a) BD program
 - Except “SBA will not consider adverse impact with respect to any requirement offered to the 8(a) program under Simplified Acquisition Procedures.” 13 C.F.R. 124.504(c).

MULTIPLE AWARD CONTRACTS

▶ **DISCRETIONARY SET ASIDES OF TASK OR DELIVERY ORDERS**

- CMS Information Systems, Inc., B-290541, Aug. 7, 2002, 2002 CPD ¶ 132
- Where a competitive request for quotations issued under the Federal Supply Schedule limits competition to small business vendors, procuring agency properly may require firms to certify as to their small business size status as of the time they submit their quotations.

▶ **MANDATORY SET ASIDES OF TASK OR DELIVERY ORDERS**

- Delex Systems, Inc., B-400403, Oct. 8, 2008, 2008 CPD ¶ 181
- The set-aside provisions of FAR 19.502–2(b) apply to competitions for task and delivery orders issued under multiple-award contracts.
- IDIQ contract was not set aside for SBCs and RFP provided some orders would be set aside for SBCs

MULTIPLE AWARD CONTRACTS

- ▶ Harmonize statutes:

- According to the GAO, the Small Business Act is older of statutory enactments – older than Competition in Contracting Act of 1984 (CICA) and Federal Acquisition Streamlining Act of 1994 (FASA). Therefore, GAO stated:

We note next that when CICA was enacted in 1984, and when FASA was enacted in 1994, both statutes expressly recognized that their requirements were to be harmonized with existing statutes.This explains, for example, why the “full and open” competition requirements of CICA can be harmonized with the FAR Rule of Two provision (which restricts competition, where the Rule of Two is met), since the latter implements the Small Business Act. Moreover, nothing in CICA or FASA would exempt task or delivery orders-and certainly nothing explicitly exempts them-from the requirements of FAR sect. 19.502–2(b). . . .In short, without an express waiver of the requirements of the Small Business Act (implemented here by the Rule of Two), we have no basis to conclude that this limited, and appropriate, exemption from the requirements of full and open competition in FAR Part 6 can exempt agencies from the requirements of FAR sect. 19.502–2(b) when placing orders.



Questions?

- ▶ FOR FURTHER INFORMATION, CONTACT:
 - OGC
 - Ken Dodds, 202-619-1766 or Kenneth.Dodds@sba.gov
 - Laura Eyester, 202-619-1801 or Laura.MannEyester@sba.gov
 - SBA's Office of Policy, Planning and Research
 - Dean Koppel, Assistant Administrator, 202-205-7322 or Dean.Koppel@sba.gov